

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DEQUARIUS D. FITZPATRICK,

Plaintiff,

v.

Case No. 19-C-1024

CHAD NYS,

Defendant.

ORDER TO SUPPLEMENT THE RECORD

Plaintiff Dequarius Fitzpatrick, proceeding pro se in this action under 42 U.S.C. § 1983, alleges Defendant violated his Eighth Amendment rights. After the court denied Plaintiff's first motion to compel discovery and for sanctions (Dkt. No 30), Plaintiff filed a second motion requesting similar relief. Dkt. No. 31. In response to this subsequent motion, Defendant maintains that no evidence exists that is responsive to Plaintiff's request. Dkt. No. 33. The question left unanswered by counsel for Defendant, however, is why there is no such evidence.

Plaintiff's second motion, essentially a motion for reconsideration, abandons some of the points raised in his first motion and attaches the entire incident report submitted by Defendant that Plaintiff believes indicates part of what he is seeking. In this incident report, Defendant stated: "At this point, Lt. Lenz arrived with additional staff and CO Goessl began to video the incident. . . . Lt. Lenz left the area to assemble a cell entry team. . . . Lt. Lenz returned with a cell entry team . . . and Co Neta took over camera operations." Dkt. No. 31-1 at 8. Plaintiff believes he has not been permitted to view the video this report describes.

It appears from Defendant's response that the video recording taken at the time of the cell extraction no longer exists. Why? Where did it go? Was it destroyed after Plaintiff filed his grievance or commenced his lawsuit? Further explanation is needed. Counsel knows that spoliation of evidence can itself be grounds for sanctions. It is not sufficient to simply say, the video recording of the incident that is the subject of Plaintiff's lawsuit no longer exists, assuming it once did.

Accordingly, counsel for Defendant is directed to respond within ten (10) days of this order and advise Plaintiff and the court whether, as the incident report suggests, the incident was video recorded and, if so, why the recording no longer exists. If the recording does exist, counsel shall promptly make arrangements for Plaintiff to be provided an opportunity to view it.

SO ORDERED at Green Bay, Wisconsin this 25th day of June, 2020.

s/ William C. Griesbach
William C. Griesbach, District Judge
United States District Court